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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re B.K., a Person Coming Under the Juvenile
Court Law.

SHASTA COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

G.G.,

Defendant and Appellant.

C087300

(Super. Ct. No. 16JVSQ3083701)

Appellant G.G., the paternal grandmother of the minor, appeals from the juvenile court's orders denying her petition for modification in which she sought placement of the minor in her home and denying her request for a continuance. (Welf. & Inst. Code, §§ 388, 395.)¹ We affirm the juvenile court's orders.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

BACKGROUND

The minor was placed in foster care shortly after her birth in November 2016. During the parents' reunification period, grandmother requested placement of the minor. Her request was denied but the Shasta County Health and Human Services Agency (the Agency) informed the juvenile court grandmother was going through the placement approval process at the time.

Grandmother completed Resource Family Approval Training and was given Resource Family Approval. On November 3, 2017, grandmother was reconsidered for placement and the juvenile court ordered her to submit to a hair follicle drug test. Grandmother did not submit to the hair follicle test and, accordingly, the Agency submitted a section 388 petition for modification, requesting grandmother be ruled out for placement. On November 28, 2017, the juvenile court ordered grandmother removed from the placement list and her Resource Family Approval was terminated.

On March 23, 2018, grandmother filed a section 388 petition requesting modification of the November 28, 2017 order removing her from the placement list. Grandmother further requested that the juvenile court replace the general placement order with a specific placement order that placed the minor with her. Grandmother alleged, as new evidence or changed circumstances, that she was removed from the placement list without cause. As evidence the proposed change order seeking placement of the minor was in the minor's best interests, grandmother offered only that she had "an established relationship" with the minor and "she is family."

Counsel for grandmother requested that the hearing on the petition coincide with the previously set April 13, 2018 section 366.26 hearing. Neither father nor grandmother appeared at the hearing. Counsel for grandmother indicated she had transportation issues and requested a continuance. The Agency argued there was no need for a hearing on the petition for modification because the petition did not set forth a change of circumstances

or demonstrate the proposed change was in the minor's best interests. The juvenile court summarily denied the petition for modification and terminated parental rights.

Grandmother appeals from the juvenile court's April 13, 2018 orders.

DISCUSSION

I

Section 388 Petition for Modification

Grandmother contends the juvenile court abused its discretion in summarily denying her section 388 petition for modification. We conclude there was no abuse of discretion.

Section 388 permits "[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court" to petition "for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court" on grounds of "change of circumstance or new evidence." (§ 388, subd. (a).) A petition to modify a juvenile court order under section 388 must allege facts showing new evidence or changed circumstances exist, and changing the order will serve the minor's best interests. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) The petitioner has the burden of proof by a preponderance of the evidence and must make a prima facie showing to trigger the right to proceed by way of a full hearing. (Cal. Rules of Court, rule 5.570(h)(1); *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) We review the juvenile court's summary denial of section 388 petitions for abuse of discretion. (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 419.)

Here, grandmother's section 388 petition sought to modify the November 28, 2017 order that removed her from placement consideration. She did not, however, allege any change of circumstance or new evidence to support the petition. Grandmother claimed (and continues to claim) the November 28, 2017 order removing her from the placement

list, itself, was the “change of circumstance.” This, of course, was not a change since the time the November 28, 2017 order was entered. Indeed, neither the petition nor the supporting memorandum alleges that *anything* had changed since the court entered its November 28, 2017 order. Thus, the juvenile court correctly found grandmother had not shown any change of circumstance in support of her petition.

In her opening brief, grandmother did not identify or present any new evidence to support the petition. She did offer the following explanations regarding why she did not submit to the court-ordered hair follicle test: (1) she had just started a new job that required her to submit to a drug test and provided a copy of the urine drug test results dated November 7, 2017; (2) she was unable to travel out of the county to submit to the test and provided a copy of a jury summons dated November 8, 2017; and (3) the Agency never attempted to reschedule the test. This, however, is not “new evidence.”

“New evidence” in the context of section 388 means “material evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered.” (*In re H.S.* (2010) 188 Cal.App.4th 103, 105.) Here, all of the evidence proffered by grandmother would have been available prior to the time the court entered the November 28, 2017 order she seeks to modify. Absent a satisfactory explanation for the failure to produce the “new evidence” at an earlier time, the juvenile court does not abuse its discretion when it denies a section 388 petition supported solely by evidence that could, with reasonable diligence, have been discovered and produced at the time of the hearing at which the order, sought to be modified, was entered. (*In re H.S., supra*, at pp. 107-109.)

Based on grandmother’s failure to show a change of circumstances or new evidence, we need not reach the issue of the best interests of the child. (§ 388, subd. (a).) We conclude the juvenile court did not abuse its discretion in summarily denying grandmother’s petition for modification.

II

Propriety of Order to Submit to Hair Follicle Test

Grandmother argues the juvenile court's order that she submit to a hair follicle test was a violation of her right to privacy. She argues it was not the least intrusive means of testing for illegal or habitual use of controlled substances and was, therefore, ordered in violation of Family Code section 3041.5. The issue, however, is not properly before us in this appeal.

The timely filing of a notice of appeal is an absolute prerequisite to the appellate court's jurisdiction to consider issues on appeal. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864.) A notice of appeal must be filed within 60 days after the rendition of the judgment or the making of an order being appealed. (Cal. Rules of Court, rule 8.406(a)(1).) The order for hair follicle testing was made on November 3, 2017. Grandmother did not appeal from that order. Instead, she filed her notice of appeal from the June 1, 2018 order denying her petition for modification. Thus, the propriety of the order to submit to a hair follicle test is not a proper subject for this appeal.

III

Relative Placement Preference

Grandmother argues the Agency and juvenile court abused their discretion by not giving her preferential consideration for placement of the minor. She argues she was not the first to be considered for placement and investigated, as required by the relative placement preference set forth in section 361.3, subdivision (a). Again, grandmother did not appeal from any earlier denial for placement. We review only the order denying the section 388 petition from which grandmother has taken her appeal.

To the extent grandmother claims she was never considered for placement in violation of section 361.3, the record belies that claim.

The statutory preference for placement with relatives, set forth in section 361.3, is satisfied if the juvenile court makes inquiries about the existence of relatives who might

be willing to accept the minor into their home, and the social worker makes a good faith effort to investigate these possible placements. (See *In re Corienna G.* (1989) 213 Cal.App.3d 73, 82-83; see also § 309.) The relative seeking placement is entitled to be the first placement to be considered and investigated, not to a “presumption” of placement. (§ 361.3 (c)(1); *In re Andrea G.* (1990) 221 Cal.App.3d 547, 556.) Instead, the juvenile court shall determine whether such a placement would be appropriate, “taking into account the suitability of the relative’s home and the best interest of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 321.)

Here, the record indicates grandmother was, in fact, considered for placement. She made an earlier request for placement, filed in August 2017, that was denied, but the Agency reported grandmother was going through the placement approval process at the time. She completed Resource Family Approval Training and was given Resource Family Approval. Thereafter, she was ordered by the juvenile court to submit to a hair follicle drug test, which she failed to do. At the Agency’s request, she was removed from the placement list and her Resource Family Approval was revoked on November 28, 2017. Thus, the record does not support her claim that she was not considered for placement.

IV

Continuance of Hearing

Grandmother argues the juvenile court abused its discretion when it denied her counsel’s request to continue the sections 388 and 366.26 hearings. We disagree.

Grandmother was not present at the April 13, 2018 section 366.26 hearing. Grandmother’s counsel requested a continuance of the section 366.26 hearing to preserve her standing to pursue her section 388 petition for modification at a hearing to be held at a later date, when she could be present in court. Instead, the juvenile court proceeded

with the section 366.26 hearing, terminated parental rights, and summarily denied grandmother's section 388 petition for modification.

As we have explained, the juvenile court did not err in *summarily* denying grandmother's petition for modification. As such, there was no need for grandmother's presence and no need to continue the section 366.26 hearing. Thus, the juvenile court did not err in denying her request for a continuance.

DISPOSITION

The orders of the juvenile court are affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
RAYE, P. J.

_____/s/
HULL, J.